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# **SURROGACY: THE VALIDITY OF SURROGACY (REGULATION) ACT 2021 IN LIGHT OF THE FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION OF INDIA (1950)**

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## **ABSTRACT**

The institution of marriage is the social order that must be followed in the event that a married couple want to have children. But this need can never be satiated for a couple that struggles with infertility. Over the course of a few of centuries, the adoption of legislation has been the universal means by which the desire of an infertile couple to have a child has been met. This paper will enlighten on to core areas whether the fundamental right which are guaranteed under the part III of the constitution of India 1950 includes the surrogacy. Also the researcher will define the meaning of surrogacy and its evolution over the span of time. In this the researcher will also analyze the Act which was passed by the parliament of India & the act called as Surrogacy (Regulation) Act 2021. Also whether the Act passed by the government what are the precautions they have taken in the act and what are the penalties did the government have inflicted towards the commercial surrogacy. What are the other arrangements did the government has done in the Act regarding power and what are the function vested to the authority.

**Keywords:** Constitution of India 1950, surrogacy, surrogacy (Regulation) Act 2021, fundamental right (Part III).

## **RESEARCH METHODOLOGY**

The "Doctrinal" technique of research was used in the conduct of this study. According to how it is defined in the field of legal research, doctrinal legal research is study "about" the current status of a legal doctrine legal rule & principle. As result, a legal researcher doing doctrinal legal research uses one or more legal propositions principle norms, doctrines in legislative instrument(s), judicial judgments on them, discussions of them in legal treatises, commentaries, textbooks, encyclopaedias, and legal journals, as well as any arguments that occurred throughout the development of such principles, rules, or doctrines. Then, after giving them a thorough "reading," I "analysed" the text as well as the laws and beliefs and came up with my "conclusions."

Thus, doctrinal legal research entails I am methodical examination of statutory provisions and the legal principles included in or derived therefrom, as well as a logical and unbiased arrangement of the legal propositions and principles.

### **Research Question**

1. Whether surrogacy should cover under the ambit of Part III Article 19 (1) (g) of the constitution of India 1950?
2. Whether the surrogacy (Regulation) Act 2021 violate any Fundamental right which is vested under the constitution of India?

### **Introduction to Surrogacy**

Every person has the inherent right to reproduce and raise their offspring. Being a parent is a life-changing and incredibly gratifying experience. The science of infertility medicine has advanced significantly in today's technologically advanced environment. A new family is created when two men or women enter into a marriage union. This family is said to be complete after the children have been born into the union. However, some couples are unable to conceive a child on their own. One in six couples, according to research, have similar issues. A child's absence is seen as a stigma by the family. There are several examples of marriages failing as a result of infertility. Infertility, sometimes known as the inability to conceive a child, is a widespread issue. The WHO report estimates that between 10 and 15 percent of people worldwide, including India, experience infertility.

The practice of surrogacy in countries like India, where one woman carries a child to term for another woman who is unable to bear children for medical reasons, represents a significant step forward in medical science. But for an infertile couple, contemporary science and technology have opened them new possibilities. A woman may now give birth to a kid for a couple or even a single individual. The commissioning couple or individual is also known as the mimicking pair. A commissioning man's or a donor's sperm may be used to artificially inseminate the agreed-upon lady. The in-vitro conceived embryo may be implanted in her, depending on the circumstances. The embryo may be created using either the gametes of the commissioning couple or donor gametes. This is followed by conception, gestation, and delivery by the female. She gives up her rights as a parent and gives the newborn to the adoptive parents. When a woman is unable to conceive, has a history of miscarrying, cannot undergo a safe pregnancy, or the couple wants to prevent a genetic issue, a surrogate mother is the best option. When an embryo created from the gametes of another man and woman is placed into a surrogate mother, neither the surrogate nor the kid shares any genetic characteristics. But medically, she is the female parent. has been artificially inseminated, and she has donated one egg. However, many surrogacy agreements are conducted for financial gain. In return for the surrogate mother's incubation services, the commissioning couple pays her a specified sum of money. In order to ensure the safety of both parties, an agreement is drawn up and signed. The pregnant woman must submit to testing, agree to an abortion if the fetus is faulty, and give birth to the couple who is starting the process. All costs, including the birth mother's potential loss of income, are the responsibility of the commissioning couple. Even without a formal contract and financial compensation, surrogacy arrangements may be created out of love and generosity between close friends and family members. The majority of the time, surrogate mother arrangements are preferable than adoption since the kid is biologically connected to the father. The arrangements for surrogate mothers raise a number of social and legal issues, nevertheless.

### **Legality of Surrogacy in foreign countries**

Although they use various tactics, the legal stances against the complex issues are compatible in several international nations. Diverse circumstances have resulted in different approaches to surrogacy. The most crucial stage is when the fertilized egg of another woman is put into the surrogate mother.

## ISRAEL

Having a Jewish mother is the standard criteria for determining a child's Jewish identity in this nation. They have made it such that the biological mother automatically becomes the child's legal mother without the requirement for adoption. Many people have a different point of view. The surrogate mother, they say, is the true mother because she takes in the embryo, cares for it, and finally gives birth to the child. Consequently, she represents the female parent. They go on to say that motherhood isn't something that can be inherited but fatherhood is. There is a mental component of attachment that is equal to or greater than a hereditary one. Surrogate moms are just like any other mothers since they carry the kid for nine months.

## United States America

In certain states the law is quite different from the law in others. In the Commonwealth of Virginia, for instance, the surrogate mother automatically becomes the child's legal parent. However, the situation is reversed under California law. A child born to a surrogate mother in Virginia is considered the legal child of the surrogate mother and her husband if the husband gives his assent. No matter whether sperm or an egg is inserted in her, she will get pregnant. That's because there is no such thing as a law in New Jersey. However, the landmark ruling in *Re Baby M*<sup>1</sup>. bolsters Virginia's legal position. Unless she can be shown to be unsuitable and hazardous to the kid, the court decided that the surrogate mother should get custody of the corpse. According to California law, a woman who donates an ovum but who does not give birth to the child is still considered the legal mother since she took the initiative and intended to have a child. In *Johnson v. Calvert*<sup>2</sup>, it was decided. According to the California Supreme Court, a kid cannot be born if its genetic mother is not present. The desire to have children was acknowledged as the main consideration. The Court also determined that the intended parents are better able to protect the child's interests. The other side maintained that the kid could not be born without the pregnant mother's assistance with incubation. It is not permitted to give the intended mother precedence over the surrogate mother.

The court ruled that the Arizona Act, which recognizes the surrogate mother as the child's legal mother and grants her custody, is unconstitutional in the case of *Soo's v. Superior Court*

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<sup>11</sup> 525 A 2d 1127 (1988)

<sup>2</sup> 19 Cal. Rptr. 2d 494 (1993)

Country of Maricopa<sup>3</sup>. The Arizona and United States constitutions' equal protection clauses are both violated by the act, according to the court's ruling. Because they are the biological parents in situations when intended parents provide the gametes. However, despite the biological father being able to be recognized as the legal parent, the biological mother could not be recognized as the parent due to the statutory a clause designates the surrogate mother as the biological mother. Due to the law's violation of equal protection, the court ruled that this was unjust. The biological mother is the one most prepared to safeguard the interests of the child, according to the court's ruling. It is unknown whether the surrogate mother will be willing to raise the kid and protect his interests when custody of the child is granted to her.

### **United Kingdom**

In the past, surrogacy in Britain was treated as it was in the American state of Virginia. However, the current version of the legislation is the result of heated social and legal discussions. The law as it now stands recognizes both commissioning parents as joint legal parents. Artificial insemination or the gametes of either the male or female partner may be used to generate an embryo.

### **CONSTITUTION OF INDIA**

The Indian Constitution is frequently referred to as the "father of all laws," or "grundnorm," since it is the source of all other existing laws and gives them their legitimacy. A constitution is regarded as a document with unique legal sanctity that outlines the structure and main responsibilities of a state's governmental entities as well as the ideals that should guide their actions. According to commonly-accepted definitions, constitutional law is the rule that governs the organisation of the main governmental institutions, how they relate to one another, and what their main responsibilities are. The Constitution serves as the basic foundation upon which the nation's laws are upheld with purity. The Constitution is a living constitution, and as time and circumstances change, so may its interpretation.

The constitution of India is divided into many 22 parts 395 Articles 12 Schedule. One of the most important parts in the constitution of India is Part III which guarantees every citizen and persons and they are called FUNDAMENTAL RIGHTS.

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<sup>3</sup> 897 P. 2d 1356 (Ariz. Div. 11994)

The Part III of the Indian Constitution is often referred to be the heart of India's thriving democratic system. The Fundamental Rights section of Part III of the Indian Constitution is referred to as the Indian Magna Carta. The earliest written text relating to people's fundamental rights is the British Magna Carta. In Britain, the first requests for the Fundamental Rights were made. However, the American Constitution was the first to include the Fundamental rights. The American Bill of Rights served as an influence to those who drafted the Indian Constitution, who included a comprehensive chapter on fundamental rights in Part III. Part III spans Articles 12 through 35. Our Constitution's protections for fundamental rights are more comprehensive than those contained in the constitutions of any other nations. All people should be treated with respect, and it is the goal of the Fundamental Rights to ensure that this is the case. As such, the Fundamental Rights serve as checks on executive overreach and checks and balances on legislative overreach. The intent of this provision of the Constitution is to create a government based on statutes rather than on individual rulers.

On that note Article 19 of the constitution provides 6 guaranteed rights and one of the rights which provide every citizen is to **Freedom of Profession and Trade**<sup>4</sup>

All citizens have the right, as outlined in Article 19 (1) (g) of the Constitution of India, to practice any profession or to carry on any occupation, trade, or business. However, this right is subject to the permissible restrictions outlined in Article 19 (6), which the state is allowed to impose on the rights of its citizens.

The vast and general rights under Art. 19(1)(g) conferred upon it does not provide the right to do something deemed unlawful in the eyes of the law, to have a certain job, or to occupy a particular position of a person's choosing. Rather, it grants all people the freedom to engage in any particular form of business of their choosing. Additionally, Art. 19(1)(g) does not imply that the state or any other statutory authority must establish circumstances in order to make any trade profitable or to attract clients to the company or businessman. Furthermore, a person who occupies a location illegally cannot assert their fundamental right to do business there since they are not permitted to use their fundamental rights to excuse illegal behaviors or prevent a statutory authority from legitimately carrying out their mandated duties.

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<sup>4</sup> Article 19 (1) (g) part III constitution of India 1950

Article 19 (1) (g) grants a wide and comprehensive right that is open to all people to engage in any profession, trade, or employment of their choosing. It does not provide the right to hold a certain position or to work at a specific company. The right to follow a vocation or to engage in a profession is distinct from the right to hold a specific position under an employment contract.

In the case of *Fertilizer Corporation v. Union of India*, the workers contested the legality of the sale of certain facilities and equipment on the grounds that doing so would violate their constitutional rights under Article 19(1)(g) and cause them to lose their jobs. The highest court ruled that Article 19(1)(g) cannot be used to defend against losing a job or being discharged from service since it does not safeguard the right to perform a specific position under a contract or employment. However, this does not provide the right to engage in conduct that is criminal in the eyes of the law or to hold a certain position of employment or to fill a particular post of a person's choosing.

### **Surrogacy (Regulation) Act 2021**

The goal of the surrogacy (Regulation) Act 2021 is to establish the National Assisted Reproductive Technology and Surrogacy Board and designate authorities for the purpose of regulating the practice and process of surrogacy, as well as any issues that are linked to or incidental to the act.

The Acts seek to regulate the multibillion-dollar reproductive medicine industry, laying out who is eligible for assisted reproductive technologies and procedures like in vitro fertilization and surrogacy, as well as the legal framework for gamete donation and surrogacy. They also lay out the conditions under which clinics must operate<sup>5</sup>.

The laws relating to surrogacy allows to married couples who are unable to conceive and to certain groups of women. Any compensation to the surrogate mother beyond that of medical and insurance costs is strictly forbidden. ART clinics and donor banks must be licensed.

The surrogacy (Regulation) Act 2021 provide certain definition by which it can be clear who are the parties are allowed under the surrogacy, also about the procedure, authorities, protection

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<sup>5</sup> <https://indianexpress.com/article/opinion/columns/with-the-surrogacy-act-the-judiciary-has-the-chance-to-expand-scope-of-reproductive-rights-8232007/>

and does the Act provide any specific protection to the child if child who is been neglected from adoption and also does if any child who is naturally born even after the natural born child the parties have right to do so. Does the act provide any type of benefit to surrogate and does the Act provide any penalty and did the government taken any step towards about prohibition to stop the multi-billion-dollar industry about the commercial Surrogacy.

While going through to the Act there are certain definitions which are necessary to understand and make outline of the Act.

## DEFINITIONS

**Section 2(zd) defines Surrogacy** according to the Act surrogacy is a custom in which one woman conceives, delivers, and presents the child to the intended parents before giving them custody of the child<sup>6</sup>.

While analyzing this definition the legislation was intent to make it a practice so whether the surrogacy is a practice then question comes that what amount to practice so the practice is nowhere defined under the law but the intent which legislation is making is that the process which is relevant as per the usage of time. Now the second term which is used is intending couple so to make the definitions clear intending couple is also defined.

**Section 2(r) define intending couple** :- it refers to the couple who want to have children through surrogacy and who have medical conditions that make gestational surrogacy necessary.<sup>7</sup>.

So this definition has strict interpretation and lays down that the couple who can only go for surrogacy those who have the medical indication related to it and who want to become the parents through surrogacy.

**Section 2(a) defines Abandoned Child** :- It refers to a kid who was born as a result of a surrogacy process but was not cared for by his or her biological parents or guardian and was subsequently deemed to be abandoned by the proper authorities after an investigation.

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<sup>6</sup> Surrogacy ( regulation ) Act 2021

<sup>7</sup> IBID



The definition of Abandoned child is vague in nature to the extent where it says declared as the abandoned child by the authority after some due enquiry so it means the child which is abandoned by the parents or the authority is considered to be under the ambit of commercial surrogacy so will there is any procedure laid down under the Act to give some protection to the Abandoned Child.

There are some other definitions which laid down under Chapter 1 under section 2 of Surrogacy (Regulation) Act 2021. The other definitions are referring to other Act so, which means the Act itself is NON- EXHAUSTIVE in nature the Act itself says it is make to constitute and not to consolidate so it is clear that Act is itself is not exhaustive and the other parts of the Act is also been discussed below.

## **Chapter II of Surrogacy ( Regulation) Act 2021 deals with the Regulation And Procedures Of Surrogacy Clinics**

**Section 3** of the Act deals with prohibition and regulations of Surrogacy clinics in this regard this Act lays down the condition that if in any of clinic, pediatrician, embryologist, registered medical practitioner or any person who is aimed for promoting surrogacy or perform any such method or perform altruistic surrogacy are barred if they are not registered with Act under which they have to comply with Provisions like India medical council Act, Medical Termination of Pregnancy Act, 1971. Also they have to perform the surrogacy they have to registered under this Act then only they can perform the surrogacy. Also in this section has the proviso which also prohibit if the practitioner stores a human embryo but this this section will not affect sperm banks, IVF and for the purpose of medical research.

**Section 4** of the Act delas with Regulation of Surrogacy and Surrogacy procedures. The Act states that if any of the person who are mentioned above surrogacy if the following condition is satisfied.

If the intending couple has a medical indication which is necessary for the surrogacy. Also the proviso of the Act provides the exception that a certificate of recommendation from the Board must be obtained by a woman of Indian descent or a woman planning to use surrogacy upon submission of an application in the format and manner specified by the Board also they

expressly prohibit the commercial surrogacy<sup>8</sup>.

Sub- section III of section. 4 delas with insurance coverage and stipulates that An insurance firm or agency that is recognized by the Insurance Regulatory and Development Authority, which was created under the Insurance Regulatory and Development Authority Act, 1999, is exempt from the requirements of this section for a period of thirty-six months. Shall provide coverage for postpartum delivery complications in the amount and manner prescribed in the surrogate mother's favor<sup>9</sup>.

In addition, the surrogate mother has an eligibility certificate issued by the competent authorities if the following requirements are met.

1. 1. Except for a woman who has ever been married, had a child of her own, and is between the ages of 25 and 35 on the day of implantation, no woman may act as a surrogate mother or aid in surrogacy by contributing her eggs.
2. A woman who is willing shall be entitled to function as a surrogate mother and to undertake surrogacy treatments in accordance with the requirements of this Act.
3. A statement from a licensed medical professional attesting to the applicant's physical and mental competence for surrogacy and related treatments.
4. The intending couple is already married and, on the day of certification, the female is between the ages of 23 and 50, and the male is between the ages of 26 and 55.
5. The intended couple have never before had a living child, either naturally, process of adoption , by surrogacy with the exception is that nothing will apply to expecting parents who have a kid who is physically or intellectually challenged, or who has a terminal disease without a permanent cure, and who is authorized by the relevant authorities with proper certificate of medical which is issued by the District Medical Board

**Section 5** of the Act deals with prohibition of conducting Surrogacy except for the purposes listed in paragraph (ii) of section 4, no one, including a surrogate mother's kin, spouse, intended

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<sup>8</sup> Section 4(1) (II) Surrogacy ( Regulation) Act 2021

<sup>9</sup> Ibid

couple, or intended woman, may solicit or support the performance of any surrogacy or surrogacy treatments on her<sup>10</sup>.

**Section 6** of the Act deals with written informed consent of surrogate mother and says that the informed the surrogate mother in question of all known side effects and long-term consequences of such operations received her written informed permission to undertake such procedures in a language she can comprehend using the specified form but it give an exception that the surrogate mother have an option to withdraw her consent for surrogacy before the implantation of human embryo in her womb.<sup>11</sup>

Section 8 deals with rights of surrogate Child a kid born via a surrogacy operation is considered to be the intended couple's or woman's biological child and is granted all the rights and privileges accorded to a child born naturally under any currently in effect laws<sup>12</sup>.

Section 10 deals with prohibition of abortion that any point of the surrogacy process, no individual, group, surrogacy center, laboratory, or healthcare facility of any type may compel the surrogate mother to abort except under circumstances that may be recommended<sup>13</sup>.

#### **CHAPTER IV DEALS WITH THE REGISTRATION OF SURROGACY CLINICS**

**Section 11 delas with registration of clinics and section 12 deals with certificate of registration** lays down that within ninety days of the date the application is received by the proper authority, the authority shall conduct an investigation and, if it is satisfied that the applicant has complied with all the requirements of this Act and the rules and regulations made thereunder, issue a certificate of registration to the surrogacy clinic in such form, upon payment of such fees, and in such manner as may be prescribed.

**Section 14 deals with Appeal** Within 30 days of receiving the notification of the order rejecting the application, suspending it, or cancelling the registration made by the appropriate authority under Section 13 and the notification of the rejection of the certificates made under Section 4, the surrogacy clinic, the intended couple, or the intended woman may choose to

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<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> Ibid

appeal the decision to the appropriate court. The state government will have the power and the central government within their jurisdictions.

**Section 15 &16 of the Act deals with establishing of The NATIONAL ASSISTED REPRODUCTIVE TECHNOLOGY & SURROGACY REGISTRY and under Section 16 deals with application of provision of ART in respect to national registry and the functions will be discharged by the ART Act.**

## **CHAPTER V**

The chapter v of the Act deals with NARTSB (NATIONAL ASSISTED REPRODUCTIVE & SURROGACY BOARD ) and SARTSB (STATE ASSISTED REPRODUCTIVE & SURROGACY BOARD )

**Section 17 deals with the constitution of the NATIONAL ASSISTED REPRODUCTIVE & SURROGACY BOARD and they can exercise the power and perform also the board shall consist of**

1. The ministers in charge of the departments of health and family welfare shall serve as chairpersons of the respective committees.
2. The position of vice-chairperson would be filled by the Secretary to the Government of India.
3. Three female members of parliament, two of whom will be chosen by the House of People, and one of whom will be elected by the members of the Council of States.
4. The joint secretary shall be comprised of three members of the ministries of the central government: the ministry of law, the ministry of women and child development, and the legislative ministry.
5. A member of the DGHSA, which is part of the federal government
6. Ten knowledgeable persons selected by the CG for membership.<sup>14</sup>

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<sup>14</sup> Section 17 of surrogacy (Regulation) Act 2021

**Section. 18 deals** with terms of the office the term will not exceeding 3 years and if such member becomes minister or minister of state or deputy minister or the speaker or deputy speaker of the house of people or the deputy chairman of any of the house from which they are elected.

**Section 25 deals** with the function which are as follows:

1. To provide advice to the Central Government on surrogacy-related issues
3. To suggest to the Central Government amendments to the Act and the rules and regulations adopted under it. To develop the code of conduct to be adhered to by those operating at surrogacy clinics.
4. To specify the minimum requirements for the physical infrastructure, laboratory and diagnostic tools, and skilled personnel that the surrogacy clinics must use.
5. To supervise the work of every state's commission on surrogacy and assisted reproduction<sup>15</sup>.

Section 26 deals with establishing the STATE ASSISTED REPRODUCTIVE & SURROGACY BOARD According to the circumstance, the State Assisted Reproductive Technology and Surrogacy Board or the Union territory Assisted Reproductive Technology and Surrogacy Board must be established in each state and Union territory having a legislature. This board is responsible for the following things and perform the functions.

1. To keep an eye on how the provisions of the Act, as well as the rules and regulations that were developed in accordance with the Act, are being put into practice, and to provide the Board with appropriate suggestions about these issues.
2. To submit to the Board any consolidated reports that may be specified with regard to the different activities that have been carried out in the state in accordance with the Act.
3. To investigate the operations of the relevant authorities that are operating within the territory of the state or union and to make recommendations about the necessary disciplinary action to be taken against them.

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<sup>15</sup> Ibid

4. To submit any consolidated reports that may be required with regard to the matter at hand.<sup>16</sup>

1. The chairpersons shall be the ministers in charge of the ministries of health and family and state welfare, respectively.

2. The Secretary of the State Legislature or the UT shall serve as the Vice-Chairperson of the Committee.

3. There will be three women elected to the state legislative body by the House of People, and there will be one chosen by the members of the Council of States.

4. The joint secretary shall be comprised of three members of the ministries of the State government: the legislative ministry, the ministry of law, and the ministry of women and child development.

5. A member of the DGHSA, which is part of the state government

6. ten knowledgeable persons selected by the SG for membership.

According to Section 28 of the law, a member's tenure in office cannot be more than three years, even if they go on to become a minister, minister of state, deputy minister, speaker or deputy speaker of the house, or vice chairman of the board from which they were elected.<sup>17</sup>

## **CHAPTER VI of the Act deals with Appropriate Authority**

For the purposes of this Act and the Assisted Reproductive Technology Act, the Central Government is required to appoint one or more relevant authorities for each Union territory within a period of ninety days from the date of the commencement of this Act by giving notice. These appointments must be made by the relevant authorities. The purposes of this Act and the Assisted Reproductive Technology Act, the State Government must designate one or more suitable authorities for the whole or any part of the State within ninety days of the date of commencement of this Act by notice.<sup>18</sup>

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<sup>16</sup> Ibid

<sup>17</sup> Surrogacy (Regulation) Act 2021

<sup>18</sup> Section 35 Ibid

## **FUNCTION OF APPROPRIATE AUTHORITY**

The duties of the appropriate authority are as follows:

- (a) granting, suspending, or cancelling a clinic's registration.
- (b) enforcing the requirements that clinics must meet.
- (c) looking into reports of violations of this Act's provisions, as well as its rules and regulations, and taking appropriate legal action.
- (d) To undertake unbiased investigations into such issues and to take the required legal measures against anybody using surrogacy elsewhere except the places mentioned in the specification, Suo motu, or that have come to its awareness.
- (e) to keep an eye on how this Act and the rules and regulations issued in accordance with it are being implemented.
- (f) to provide suggestions to the Board and State Boards on adjustments to the rules and regulations that are required by societal or technical change.
- (g) To respond to complaints against surrogacy clinics based on the findings of its investigations<sup>19</sup>.

The appropriate authority will exercise its authority over the following:

- (a) summoning anyone with knowledge of a violation of this Act's provisions or the rules and regulations made thereunder
- (b) requiring the production of any documents or material objects related to clause (a)
- (c) having the right to search any location where it is believed that this Act's provisions or the rules and regulations made thereunder are being broken<sup>20</sup>.

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<sup>19</sup> Section 36 Ibid

<sup>20</sup> Section 37 Ibid

Surrogacy clinic registration, cancellation, renewal, certificate issuance to intended parents and surrogate mothers, and all other matters relating to the issuance of licenses, etc., shall be recorded and reported to the National Assisted Reproductive Technology and Surrogacy Board in such format as may be prescribed.

## **CHAPTER VII OFFENCES & PENALTIES**

No person, organization, surrogacy clinic, laboratory, or clinical facility of any kind shall: (a) engage in commercial surrogacy, offer commercial surrogacy or its related component procedures or services in any format, operate a racket or an organized group to empanel or choose surrogate mothers, or use individual brokers or intermediates to arrange for surrogate mothers and surrogacy procedures, at such clinics, labs, or any other location; or (b) use individual brokers or intermediates to arrange<sup>21</sup>

Any violation of the provisions contained here & the Indian Penal Code is a crime punishable by a period of imprisonment that may not exceed ten years and a fine that may not exceed 10 lakh rupees.<sup>22</sup>

### **Punishment for contravention of the provision of the Act<sup>23</sup>**

Any medical practitioner gynaecologist, paediatrician, embryologist, or individual who owns or works for a surrogacy center or laboratory and provides his professional or technical services to or at such a center or laboratory, whether on an honorarium basis or otherwise, and who violates any of the following a period of imprisonment that may not exceed five years, as well as a fine that may not exceed ten lakh rupees, for violating any of the provisions of this Act (other than those referred to in section 38) and rules and regulations established thereunder.<sup>24</sup>

The registered medical practitioner must be submitted by the competent authorities to the State Medical Council in question in order for that council to take the required measures, which may include suspending the practitioner's licence for a term of five years.<sup>25</sup>

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<sup>21</sup> Section 38 of Surrogacy (Regulation) Act 2021

<sup>22</sup> 38(2) Surrogacy ( Regulation ) Act 2021

<sup>23</sup> Sec 39 surrogacy ( Regulation ) Act 2021

<sup>24</sup> Section 39 (i) surrogacy(regulation ) Act 2021

<sup>25</sup> Sec. 39 (2) surrogacy regulation Act 2021



**Punishment for not following altruistic surrogacy<sup>26</sup>**

For the first offence, a surrogacy clinic, laboratory, or licensed physician, gynaecologist, paediatrician, embryologist, or other individual who assists an intended couple or intended woman in violating the altruistic surrogacy or conducting surrogacy procedures for commercial purposes faces up to five years in prison and a fine of up to five lakh rupees.<sup>27</sup>

Penalty for the contravention of the provision of the Act if no specified punishment is given

Anyone who the provisions of the prescribed Act its rules, the regulations prescribed under it and where no penalty is provided under this Act is subject to imprisonment for term that may not exceed three years and a fine that may not exceed five lakh rupees, as well as an additional fine that may not exceed 10 thousand rupees that the violation continues after punishment for the first offence.<sup>28</sup>

**What will happen in case of surrogacy presumption?**

Section 42 of Act lays down that the Indian Evidence Act of 187, the court shall presume, unless there is evidence to the contrary, that the woman or surrogate mother was coerced by her husband, the intended couple, or any other relative, as the case may be, to perform surrogacy services, procedures, or donate gametes for purposes other than those specified in section 4, and such person shall be liable for aiding and abetting such offence under section 40 and shall be punished for the offence. the Indian Evidence Act of 1872 provides the same.<sup>29</sup>

The offence which will commit the code of criminal procedure 1973 will apply and the offence will be:

1. Cognizable
2. Non- bailable
3. Non- compoundable <sup>30</sup>

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<sup>26</sup> Sec. 40 IBID

<sup>27</sup> IBID

<sup>28</sup> Section 41 surrogacy (Regulation) Act

<sup>29</sup> IBID

<sup>30</sup> Sec 43 surrogacy ( Regulation ) Act 2021

4. Also the cognizance of offence will be taken only on complaint made by writing and given to appropriate authority on behalf of CG & SG and a notice of 15 days if the social organization which is given to the court.
5. The metropolitan magistrate and the judicial magistrate of first class will try the offence punishable under this Act.<sup>31</sup>

The chapter XXIA plea bargaining of code of criminal procedure will not apply under this Act because the offence under this Act is of against society interest and are of against the country.<sup>32</sup>

### **Power of search & seizure**

Any officer authorized in this respect or the appropriate authority may enter and search any surrogacy clinic or other site if they have grounds to think that a violation of the law has been or is being committed there, subject to any regulations that may be specified. said surrogacy clinic or other location at all reasonable times with whatever assistance, if any, said authority or officers consider necessary, and examine any record, register, document, book, or other item they deem relevant. Also sub- section 2 of the section and it lays that the power of search and seizure will apply as per the code of criminal procedure 1973.<sup>33</sup>

By analyzing the Act it has been to the conclusion that the Act is not exhaustive but the power, procedure and all the question which we discussed as question are really discussed in detail

And the legislature also drafted the Act perfected. Neither I have found any of the loophole in the Act.

### **RESEARCH Q&A**

#### **1. Whether surrogacy should cover under the ambit of Part III Article 19 (1) (g) of the constitution of India 1950?**

While going through the surrogacy (Regulation) Act 2021 the act was well drafted but to make the surrogacy as fundamental right the case of kesvananda.Bharti sripandagalvaru v. state of Kerala and Anr in which the supreme court of India held that fundamental rights can be

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<sup>31</sup> Sec 44 of Surrogacy ( Regulation ) Act 2021

<sup>32</sup> Sec 45 of Surrogacy (Regulation ) Act 2021

<sup>33</sup> Sec 47 Surrogacy (Regulation ) Act 2021

amended and subjected to conditions. The court has given the reasoning that the constitution of India should not be distributed and the rights if they are not included in Basic Structure but the principles of FEDERALISM, SECULARISM, DEMOCRACY. The court also held that if certain features of the constitution are so essential to its existence that if they are taken away the constitution would fall in its eternity. now with the same the Article 19 (I) g the if the constitution of India provides the Right to practice any profession or to carry any profession then the rights are vast general but interpretation of article will not confer the citizens to do any anything which illegal in eyes of laws or to hold a particular job or profession. Additionally, Art. 19(1)(g) does not imply that the state or any other statutory authority must create circumstances that would make any profession profitable or attract clients to the firm or businessman. Furthermore, a person who occupies a location illegally cannot assert their fundamental right to do business there since they are not permitted to use their fundamental rights to excuse illegal behavior or prevent a statutory authority from legitimately carrying out their mandated duties.

Now under Article 19 the right to practices any profession or to carry any occupation has also certain limitations which is under article 19 (6) which provide reasonable restrictions. The Indian Constitution, which is purposefully ambiguous and permits justifiable restrictions on the exercise of rights in the public good. But even if restrictions are only intended for residents of a certain state, the Court has noted that they are nonetheless in the interests of the broader public. It does not imply that the interest of the Indian populace as a whole must be paramount. It may even be in relation to a certain person's interests. Things that are in the interest of public order will also be in the interest of the general public, but a limitation may be claimed to be in the interest of public order only if there is a direct and proximate connection between the restriction and public order. According to me, if surrogacy is recognized as a basic human right, then the rights of any children who are abandoned in the future will be protected under Article 21.

## **2. Whether the surrogacy (Regulation) Act 2021 violate any Fundamental right which is vested under the constitution of India?**

The Surrogacy (Regulation) Act Section 4(iii)(b) is a violation of Article 14 of the Indian Constitution. One of the wonderful pillars of Indian democracy is equality. Any change to the Constitution that violates the right to equality shall be deemed unconstitutional. A state

legislature or the parliament cannot violate the equality principle. "Equality is a core characteristic of the Constitution of India and any treatment of equals unequally or unequal as equals would be a breach of the basic structure of the Constitution of India," the Supreme Court recently reaffirmed this concept in the *Badappanavar* case. That the right to equal protection is the right to be treated equally in identical circumstances, in terms of both benefits and burdens. The idea that two equal people can't be treated differently is baked into the notion of equality. Article 14 is based on the idea that everyone should be treated the same under the law. In and of itself, discrimination is not a breach of Article 14's prohibition on "unfair" treatment. Only in cases where there is no justifiable difference between the two does it rule out equal protection.<sup>34</sup>

### AGE-BASED RESTRICTON IS UNCONSTITUTIONAL

In *Indian Council of Legal Aid & Advice v. Bar Council of India* The Supreme Court ruled that BCI's age restriction of 45-and-up is unconstitutional since it is discriminatory, irrational, and arbitrary.<sup>35</sup> In *Air India v. Nergesh Meerza* flight India International's policy that set the typical age of retirement of air hostesses at 35 years, but allowed the managing director to extend the same to 45 years, was found to be illegal. The mandatory retirement age in India has been increased by the government from 55 to 58 years of age. The respondent did not get any advantages from this ruling. The court ruled that the order was illegal since it went against Article 14.<sup>36</sup>

It has been held that although Article 14 prohibits class legislation, it does not prohibit fair categorization for the purposes of law, as stated in *Budhan Choudhry and Ors. v. The State of Bihar*<sup>36</sup>. However, there are two requirements that must be met for a classification to be legal under the First Amendment: (i) the purpose intended to be reached by the legislation in issue must have a reasonable connection to the differentia used in the classification; and (ii) the differentia used in the classification must be understandable.<sup>37</sup>

The provision's strictness should be proportional to its intended effect.<sup>38</sup> The idea behind this statement is that Art. 14 of the Indian Constitution is violated because unchecked discretionary

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<sup>34</sup> *M.G Badppanavar v. state of Kerala* , AIR 2001 SC, at 264

<sup>35</sup> AIR 2004 SC 361

<sup>36</sup> AIR 10981 SC 1829

<sup>37</sup> (1995) 1 SCR 104; *Dharamdutt & Ors v. Union of India* and Ors. (2004) 1 SCC 496

authority might lead to discrimination or arbitrary decision-making.<sup>38</sup> So the Act passed by the legislative are somehow violative of Art.14 & Art.19 of the constitution of India.

### **Challenges in Surrogacy**

#### **Surrogacy as Exploitation: Making child as commodities and mothers**

As a kind of exploitation, surrogacy reduces mothers and children to the status of commodities. The practice of surrogacy violates the dignity of the child since it turns the kid into the subject of a business transaction and a commodity. Even if the mother's involvement in the procedure is voluntary, the fact that she is essentially seen as a "womb for sale" undermines the dignity of the mother even more. The surrogacy industry provides a fertile ground for the sexual exploitation of both women and children. Theresa Erickson, an American attorney who was recently convicted of orchestrating a profitable illegal surrogacy ring that exploited both surrogates and contracting parents, stated that her participation in abusing the system was just the "tip of the iceberg." Erickson was recently convicted of orchestrating a profitable illegal surrogacy ring that exploited both surrogates and contracting parents. The Oireachtas must take the lead among European countries in the effort to outlaw surrogacy by using the principles enshrined in existing instruments like the Convention on the Rights of the Child and the Convention on the Adoption of Children (Revised). This will protect them from being exploited in the now and the future.<sup>39</sup>

#### **The Medical, psychological & social harms of surrogacy to the surrogate to child and the contracting parents:**

Surrogacy the contractual parents, the genetic mother and father, the surrogate, and the act of purposeful (as opposed to biological) motherhood create a scenario in which as many as five persons may claim parental status over the resultant kid. The reproductive function of marriage is fragmented by this fact, which has several negative effects. "First, it separates sex from reproduction; second, it separates motherhood from pregnancy; and third, it separates the unity of one couple in the involvement of a third person within the potential family relationship," says one expert.<sup>40</sup>

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<sup>38</sup> Jain. M.P. ,Indian Constitutional Law page 1014: lexis Nexis ed 7. 2014

<sup>39</sup> Dr. Nandita Adhikari, Law & Medicine page no 252 Ed 2017

<sup>40</sup> IBID

## RECOMMENDATIONS

Here are some of the recommendations which I think should adopted into the new legislation.

1. The elimination of a restrictive rule that had previously limited the ability to do altruistic surrogacy to only distant relatives. Civil society groups and campaigners were worried that the legislation would reinforce complicated family structures that put women's rights in jeopardy if it limited surrogates to just close relatives.
2. Inclusion includes women who are not married in the scope of the study. In an earlier version of the legislation, unmarried women, including widows and women who had been divorced, were not included.
3. Revision of the definition of infertility to conform with the recommendations established by the WHO, which define infertility as the inability to conceive a child for a period of one year. In the past, inability to have a child after trying for a period of five years was the legal definition of infertility.

## Conclusions

To ensure a linear and consistent approach to the regulating norms, legislative proclivity and sensitization are needed. The popularity of the process has not been greatly hampered by the lack of industry regulation in India up to this point because of the methodological excellence and very inexpensive implementation. Exploitation is still widespread, however. Furthermore, since it is only available to heterosexual married couples of a certain age, the exclusion of elderly couples, single people, couples in live-in relationships, and members of the LGBTQ community hinders equality before the law and the constitutional guarantee against discrimination. The Bill seeks to outright outlaw commercial surrogacy, bearing in mind its history of exploitation, which not only violates their right to personal liberty but also the values of equality outlined in Article 14 of the Indian Constitution. There is an ignorance of the fact that commercial surrogacy is not exploitative and requires strong supervision and rules, which the current Bill avoids by enacting a broad prohibition.<sup>41</sup>

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<sup>41</sup> <https://indianexpress.com/article/opinion/columns/with-the-surrogacy-act-the-judiciary-has-the-chance-to-expand-scope-of-reproductive-rights-8232007/>

It is important to accept the recommendations of the Parliamentary Standing Committee that ensure PIO, NRI, OCI, live-in couples, divorced women, and widows have equal access to surrogacy treatments. In accordance with the World Health Organization's definition of infertility, the Committee also proposed lowering the qualifying period from five years to only one. Because it was believed that limiting the practice of surrogacy to close relatives was unrealistic and impractical, the Committee recommended that this Clause of "close relative" be removed. This would increase the possibility of finding surrogate mothers from outside the immediate family of the intended parents. This was done because it was believed that restricting the practice of surrogacy to close relatives was unrealistic and unworkable. The Committee also concurred with the suggestion made by the Ministry of Women and Child Development, which stated that a surrogate mother should have the option to withdraw from the surrogacy agreement prior to the beginning of the process if she so chooses. The Committee also suggested setting a deadline for the District Medical Board to provide an essentiality certificate for any appeal or review process in the event that the surrogacy application is denied.<sup>42</sup>

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<sup>42</sup> IBID

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